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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 JOUREY NEWELL and FELIPE
8 MACHADO, individually and on
9 behalf of all others similarly situated,

10 Plaintiffs,

11 v.

12 RECREATIONAL EQUIPMENT
13 INC.,

14 Defendant.

C19-662 TSZ

ORDER

15 THIS MATTER comes before the Court on Defendant Recreational Equipment
16 Inc.'s ("REI") Motion to Dismiss, docket no. 21. Having reviewed all papers filed in
17 support of and in opposition to the motion, the Court enters the following order.

18 **Background**

19 REI is a sporting goods consumer cooperative owned by its members.¹ First
20 Amended Complaint ("FAC") ¶ 15 (docket no. 17). REI does not issue capital stock or
21 have shareholders; rather, REI places control of the company in its "members"—

22 ¹ According to the company's bylaws, REI is organized as a consumer cooperative under RCW
23 24.06.032. Ex. 1 to Todaro Decl. (docket no. 22-1 at 2). The Court incorporates REI's bylaws by
reference because no party questions their authenticity, the complaint refers to them, and they are central
to Plaintiffs' claims. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

1 members of the public that become REI members for a fee. *Id.* As a consumer
2 cooperative, REI distributes its net earnings back to its members in the form of patronage
3 dividends. *Id.* ¶ 16. The amount of each member’s dividend is calculated as a percentage
4 of the amount each member spent at REI in the prior year. *Id.* REI’s Board of Directors
5 retains the discretion to determine both the amount and form of patronage dividends each
6 year, as well as whether or not they are issued at all. FAC ¶ 18; Ex. 1 to Todaro Decl.
7 (docket no. 22-1 at 8). REI issues patronage dividends on a yearly basis either by loading
8 them on mailed paper cards or emailed URLs. FAC ¶ 19. Members’ dividends expire
9 the second January 3rd after issuance.² FAC ¶ 26; Ex. 1 to Todaro Decl. (docket no. 22-1
10 at 9). The dividends are associated solely with each member’s number, are non-
11 transferrable, and are redeemable and honored only at REI for the purchase of REI items.
12 FAC ¶¶ 20-21; Defendant’s Motion to Dismiss at 10-11 (docket no. 21).

13 Plaintiffs Newell and Machado paid fees to become REI members. FAC ¶¶ 28,
14 33. In 2015, Newell made purchases at REI, and in 2016, REI issued Newell a dividend.
15 *Id.* ¶¶ 29-30. In January 2018, Newell’s unused dividend expired. *Id.* ¶ 31. In 2016,
16 Machado made purchases at REI, and he received a dividend in 2017. *Id.* ¶¶ 34-35. In
17 2019, Machado’s dividend expired. *Id.* ¶ 36.

18 Plaintiffs now sue under two statutes regulating the use of expiration dates on gift
19 cards: the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. §§ 1693-1693r, and
20 Washington statute, RCW 19.240.020. The EFTA prohibits the issuance of gift cards
21 with expiration dates less than 5 years after the date the gift card was issued, or the date
22 _____

23 ² For example, in January 2019, every dividend REI issued in March 2017 expired.

1 the card funds were last loaded to the gift card. 15 U.S.C. § 1693l-1(c). RCW 19.86.020
2 prohibits the issuance of gift cards with any expiration date. Plaintiffs allege that REI's
3 patronage dividends violate both the EFTA and RCW 19.240.020 because they expire
4 less than two years after issuance.

5 **Discussion**

6 “To survive a motion to dismiss, a complaint must contain sufficient factual
7 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
8 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
9 570 (2007)). The complaint must indicate more than mere speculation of a right to relief.
10 *Twombly*, 550 U.S. at 555, and the pleading is not sufficient “if it tenders ‘naked
11 assertions’ devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678 (quoting
12 *Twombly*, 550 U.S. at 557). In ruling on a motion to dismiss, the Court must assume the
13 truth of the plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s
14 favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question for
15 the Court is whether the facts in the complaint sufficiently state a “plausible” ground for
16 relief. *Twombly*, 550 U.S. at 570.

17 Plaintiffs’ Amended Complaint fails to state a claim for which relief can be
18 granted, because even assuming every fact alleged in the Amended Complaint is true,
19 REI’s dividends are not subject to the gift card requirements in either 15 U.S.C. § 1693l-1
20 or RCW 19.240.020. Plaintiffs’ Amended Complaint is DISMISSED with prejudice
21 because Plaintiffs cannot replead to correct their legal errors.
22
23

1 **A. Electronic Funds Transfer Act (“EFTA”) and Credit Card Accountability**
2 **and Disclosure Act (“CARD”), 15 U.S.C. § 1693l-1**

3 The EFTA provides that “it shall be unlawful for any person to sell or issue a gift
4 certificate, store gift card, or general-use prepaid card that is subject to an expiration
5 date.” 15 U.S.C. § 1693l-1(c)(1). The EFTA provides, in part, as follows:

6 The term “store gift card” means an electronic promise, plastic
7 card, or other payment code or device that is—

8 (i) redeemable at a single merchant or an affiliated group of
9 merchants that share the same name, mark, or logo;

10 (ii) issued in a specified amount, whether or not that amount may
11 be increased in value or reloaded at the request of the holder;

12 (iii) purchased on a prepaid basis in exchange for payment; and

13 (iv) honored upon presentation by such single merchant or
14 affiliated group of merchants for goods or services.

15 15 U.S.C. § 1693l-1(a)(2)(C). The Official Staff Interpretations of EFTA³ provide that
16 “[a] card, code, or other device that meets the definition in [the EFTA] includes an
17 electronic promise.” 12 C.F.R. § Pt. 1005, Supp. I. The Regulation promulgated to
18 enforce the EFTA, Regulation E, further provides that an “electronic promise” means “a
19 person’s commitment or obligation communicated or stored in electronic form made to a
20 consumer to provide payment for goods or services for transactions initiated by the
21 consumer.” 12 C.F.R. § Pt. 205, Supp. I.

22 ³ The Board of Governors of the Federal Reserve System drafted the regulations—also known as
23 Regulation E—enforcing the EFTA. *See* 12 C.F.R. § 205.1 (2010). The Board also designated its
Director of Consumer and Community Affairs to issue official staff interpretations of the regulations
which it published in 12 C.F.R. § Pt. 1005, Supp. I.

1 REI's patronage dividends do not fall within the definition of gift card under the
2 EFTA because they are not "electronic promise[s]" "purchased on a prepaid basis in
3 exchange for payment." 15 U.S.C. § 1693l-1(a)(2)(C) (emphasis added).

4 Article V of REI's bylaws governs the company's dividends. It states that "[t]he
5 REI Board may elect not to declare or distribute a patronage dividend of net distributable
6 surplus for any calendar year if it determines that such election is in the best interest of
7 REI." Ex. 1 to Todaro Decl. (docket no. 22-1 at 8). Thus, REI's patronage dividends are
8 not "purchased on a prepaid basis in exchange for payment" because a member cannot
9 purchase a patronage dividend.

10 Further, whether REI decides to issue a dividend is purely at the discretion of
11 REI's board, and thus the dividends are not "electronic promises" "purchased on a
12 prepaid basis in exchange for payment" as required by the EFTA. *See* 12 C.F.R. § Pt.
13 205, Supp. I (defining "electronic promise" as a commitment); *Barnes v. Yahoo!, Inc.*,
14 570 F.3d 1096, 1106-07 (9th Cir. 2009) (defining promise as "a manifestation of an
15 intention to act or refrain from acting in a specified way, so made as to justify a promisee
16 in understanding that a commitment has been made") (citing Restatement (Second) of
17 Contracts § 2 (1)).

18 Plaintiffs cite no relevant law, arguments, or facts to the contrary. Rather, in
19 response, Plaintiffs allege that REI's membership dividends are governed by the EFTA
20 because "by paying a membership fee to a cooperative in return for the right to a
21 patronage dividend, a member has made 'payment of goods and services,'" and thus "the
22 member has purchased the patronage dividend on a prepaid basis in exchange for the
23 membership fee." Plaintiffs' Response to Motion to Dismiss (docket no. 25 at 8). That

1 argument is irrelevant to the EFTA, because a cooperative membership is entirely
2 different from the member patronage dividends at issue in the Amended Complaint.
3 Moreover, by that logic, only the “right to a patronage dividend” is “purchased in
4 exchange for payment” and thus only that “right” (i.e. the REI *membership*)—not the
5 dividends themselves—would be governed by the EFTA.

6 Plaintiffs also cite *United Grocers, Ltd. v. U.S.*, for the proposition that by “paying
7 a membership fee to a cooperative in return for the right to a patronage dividend,” a
8 member “has purchased the patronage dividend on a prepaid basis in exchange for the
9 membership fee.” 308 F.2d 634, 639-40 (9th Cir. 1962); Plaintiffs’ Response to Motion
10 to Dismiss (docket no. 25 at 8-9). Notwithstanding that *United Grocers* was issued
11 nearly sixty years ago, long before the passage of either CARD or the EFTA, the analysis
12 in that case deals solely with the classification of *membership fees* as either gross taxable
13 income or capital contributions. It does not address the issue of whether *patronage*
14 *dividends* themselves are purchased on a prepaid basis in exchange for payment, or
15 whether patronage dividends that are purely discretionary can be considered purchased
16 on a prepaid basis in exchange for payment.

17 The Court concludes that REI’s patronage dividends are not gift cards under the
18 EFTA because they are not “electronic promises” “purchased on a prepaid basis in
19 exchange for payment.”⁴

21
22 ⁴ Because REI’s patronage dividends are not gift cards under the EFTA, the Court would not have to
23 address whether the EFTA’s reloadable, loyalty or public marketing exceptions govern REI’s patronage
dividends. However, it seems clear that these dividends would be excluded under either the EFTA’s
reloadable or loyalty exceptions.

1 **B. Washington’s Gift Card Statute, RCW 19.240.020**

2 Plaintiffs also fail to state a claim under RCW 19.240.020 for the same reason
3 stated in Section A, *supra*.⁵ This claim is also DISMISSED with prejudice.

4 In 2004, the Washington State Legislature passed RCW 19.240.020 to “prohibit
5 acts and practices of retailers that deprive consumers of the full value of gift certificates,
6 such as expiration dates, service fees, and dormancy and inactivity charges on gift
7 certificates.” RCW 19.240.005. RCW 19.240.020 provides that “it is unlawful for any
8 person or entity to issue, or to enforce against a bearer, a gift certificate [or gift card] that
9 contains . . . [a]n expiration date.” For the purposes of that section, the Washington
10 Legislature defines “gift certificate” or “gift card” as “an instrument evidencing a
11 promise by the seller or issuer of the record that consumer goods or services will be
12 provided to the bearer of the record [at] the value or credit shown in the record.”
13 RCW 19.240.010 (emphasis added). Put simply, REI’s patronage dividends are not “gift
14 cards” under the Washington statute as a matter of law.⁶

15 For the same reasons set forth in A(1), *supra*, REI’s patronage dividends are not
16 “promises.” Thus, the dividends are not subject to the bar on expiration dates under
17 RCW 19.240.020.

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20 ⁵ Because REI’s patronage dividends are not gift cards under RCW 19.240.020, the Court does not need
to address whether that statute is in conflict with RCW 23.86.160, the Washington statute governing the
distribution of earnings by cooperatives.

21 ⁶ The Washington state legislature’s intent to exclude dividends from RCW 19.240.020 is clear. RCW
22 19.240.005 states that the legislature “does not intend that [RCW 19.240.020] . . . be construed to apply to
cards or other payment instruments issued for payment of wages or other intangible property” and “that
23 any ambiguities should be resolved by applying the Uniform Unclaimed Property Act.” The Uniform
Unclaimed Property act states that “intangible property” includes dividends. RCW 63.29.010 (12).

1 **C. Dismissal with Prejudice**

2 If the Court dismisses the complaint or portions thereof, it must consider whether
3 to grant leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). “[I]n
4 dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should grant
5 leave to amend even if no request to amend the pleading was made, unless it determines
6 that the pleading could not possibly be cured by the allegation of other facts.’” *Id.* at
7 1127 (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

8 REI’s patronage dividends are not subject to the gift card requirements in either
9 federal or Washington statutes. Because no amount of repleading can change the law, the
10 Court dismisses all claims with prejudice.

11 **Conclusion**

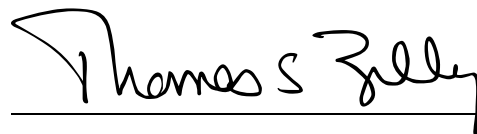
12 For the foregoing reasons, the Court ORDERS:

13 (1) Defendant’s Motion to Dismiss, docket no. 21, is GRANTED. The Court
14 hereby DISMISSES this matter with prejudice.

15 (2) The Clerk is DIRECTED to enter judgment consistent with this Order, to
16 CLOSE this case, and to send a copy of this Order to all counsel of record.

17 IT IS SO ORDERED.

18 Dated this 26th day of September, 2019.

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21 Thomas S. Zilly
22 United States District Judge
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